In the Supreme Court of the United States

OCTOBER TERM 1942.

No. 750.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

vs.

GEORGE A. KUBLER,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT, GEORGE A. KUBLER,

On First Question Presented in Petition of Thad Benson Carter, as Petitioner.

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CERTIORARI GRANTED.

On April 5, 1943, petitioner's request for writ of certiorari was granted in this cause.

On April 6, 1943, the following direction and order from the Clerk of this Court, Charles Elmore Cropley, was submitted to counsel for the respondent:

> "In the case of Carter v. Kubler, No. 750, October Term, 1942, the Court today granted the petition for writ of certiorari, limited to the first question presented by the petition, and the case is transferred to the summary docket. Counsel are requested to discuss in their briefs and on the oral argument the question whether the error, if any, was cured by the District Court's review."

Inasmuch as the parties are now limited by the Court to Part One of the petition of the farmer debtor, we respectfully ask leave herewith to submit to the Court this supplemental brief.

THE ONE QUESTION IN ISSUE.

An examination of the record and briefs filed before the granting of certiorari by this Court, and on direction of this Court the one question now to be considered is, Does the alleged irregularity in the conduct of a Commissioner in collecting and reporting evidence to a Judge of the U. S. District Court in relation to proceedings had under the provisions of the Bankruptcy Act, Sec. 75 (s) (3), which states:

> "Upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property * * *."

for the purpose of fixing the price at which a farmer debtor may redeem, constitute prejudicial error when the Judge, on a review of the report of such Commissioner and upon due consideration of all the evidence, fixes the price at an amount substantially less than the amount recommended by the Commissioner and renders his judgment accordingly, without objections or exceptions thereto by the farmer debtor based on such alleged irregularity?

The Commissioner's recommendation was $150.00 per acre—aggregating $25,200.00.

The judgment of the Court as to the reappraised value of the farm was $20,000.00, or at the rate of $119.00 per acre.

On page 9 of the record, the full report of the Commissioner is shown, and in such report is the following statement:

"After hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the Conciliation Commissioner of the value of said farm, I hereby fix the value of said farm at $150.00 per acre."

THE RECORD FACTS AS TO THIS CLAIMED ERROR.

In our brief for the respondent opposing writ of certiorari, at pages 4 to 6 inclusive, the finding of his Honor, Judge Jones, of the District Court, is set forth. We now submit the judgment of the Court as evidenced by the Journal Entry.

"This cause came on for hearing on petition for review filed on behalf of the farmer debtor, Thad Benson Carter, for a review of the order of the conciliation commissioner finding the present fair and reasonable market value of the farm land in question and fixing a date for redemption, and upon the record, evidence, and the arguments of counsel for the parties, and was submitted to the court.

Upon consideration thereof the court finds that the present fair and reasonable market value of the said land is twenty thousand dollars ($20,000).

The court therefore finds, orders, and adjudges that the present fair and reasonable market value of said farm land is twenty thousand dollars ($20,000).

The court, considering further the question as to the period of time within which the farmer debtor may redeem said described land at said valuation, grants said farmer debtor the right to redeem said farm land until December 15, 1941.

It is the further order and judgment of the court that if said farmer debtor shall not redeem said land on or before December 15, 1941, that said farm land shall be sold at public sale according to law.

(Signed) JONES,

Judge."

This Journal Entry was filed November 17, 1941, as shown on page 8 of the "Transcript of Record."

The Application for Rehearing, omitting formal parts, is as follows:

> "Now comes the farmer debtor, Thad Benson Carter, and applies to the court for a rehearing of the matter which was the subject of the Journal Entry of this court entered November 17, 1941, reading as follows:
>
> (Said Journal Entry is then set forth, and the Petition for Rehearing continues:)
>
> This petition for rehearing is presented for the consideration of the court for the reason that in the court's memorandum on the subject of the order preceding the entry of said order, which memorandum was filed on or about November 7, 1941, it was said in said memorandum concerning the valuation of $5800 originally placed upon the real estate in question by the conciliation commissioner: 'However that value, the commissioner stated, was made for taxation purposes.'
>
> Thad Benson Carter, the said farmer debtor, respectfully represents to the court that the original valuation of $5800 was, in the opinion of the conciliation commissioner, the fair and reasonable market value of the said real estate when such valuation was made."

Two affidavits, ex parte in character, are then attached, purporting to show that the former appraisement, made some four or five years prior to the appraisal in question for tax or rental purposes, was as to the fair value of the farm.

Such Petition concludes as follows:

> "Wherefore the said Thad Benson Carter, farmer debtor herein, prays the court to rehear the said matter; to reverse the order of the said conciliation commissioner which is the subject of his petition for review herein and that he may have such relief as he may be entitled to in equity and justice.
>
> (Signed) THAD BENSON CARTER,
> *Farmer Debtor.*"

JUDGMENT ON REHEARING APPLICATION.

The Petition for Rehearing was disposed of as follows:

"In the Matter of
Thad Benson Carter
Debtor No. 33696

APPLICATION FOR REHEARING

RULING: 'Upon due consideration, application denied.'

Dec. 9, 1941 JONES,
Judge."

NOTICE OF APPEAL.

Thereafter, and on December 15, 1941, the Notice of Appeal, filed in the United States District Court, with copies to attorneys of record, was as follows:

"Notice is hereby given that Thad Benson Carter, the farmer debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit

(1) From the final order and judgment on the petition for review of the order of Harry E. Wood finding that the present fair and reasonable market value of the farmer debtor's farm land is $20,000, and that said farm land shall be sold at public sale according to law if said farmer debtor shall not redeem said land on or before December 15, 1941, entered in this action on November 17, 1941; and

(2) From the final order and judgment entered in this action on December 9, 1941, denying the application of Thad Benson Carter for rehearing of said final order and judgment entered in this action on November 17, 1941.

Lima, Ohio. ELMER MCCLAIN and
LEON N. STONE,
Lima, Ohio,
Attorneys for the Appellant,
Thad Benson Carter."

Such various docket entries are referred to in "Transcript of Record" at page 8.

THE PRESENT ERROR QUESTION NOT RAISED IN THE TRIAL COURT.

The one error question now under consideration was never raised or questioned in any of the proceedings before the District Court or before the Commissioner appointed by the Court to hear and to submit to the Court the evidence on the question of the reappraised value of the farm.

The first intimation of any claimed error as to the one statement made by the Commissioner in his report to the Court, which is now claimed as error, appeared in the brief submitted on behalf of the farmer debtor to the United States Circuit Court of Appeals.

In other words, this Court is now asked to determine a question of error which was in no manner presented to the trial court, and which claimed error for the first time was urged in the reviewing court.

No objections or exceptions on this question of any kind were noted in any of the proceedings before the District Court, and hence the District Judge had no opportunity to consider or to correct the claimed error.

REVIEW OF CLAIMED ERRORS OF THE TRIAL COURT.

We submit that reviewing courts have repeatedly announced and held that objections to any questionable matter in the record evidence should be raised in the trial court, and that such question cannot be raised for the first time in the reviewing court.

This Court is now asked to find error as to a question not urged or considered by the Trial Judge.

In 1856, in the case of *McMicken vs. Perin*, 59 U. S. (18 Howe) 507, opinion of the Court by Mr. Justice Campbell, it was held:

> "The Supreme Court of the United States will not review a Master's report upon objections first taken in that Court on appeal."

In re *Elliott, International Harvester Co. of America vs. Schmidt*, 72 Fed. (2nd) 300, decision of the Circuit Court of Appeals of the Eighth Circuit in 1934, it is held:

> "4. Assignment of error on appeal from District Court's judgment affirming order of Referee in Bankruptcy could not be considered, where transcript shows that question presented by assignment was not submitted to Referee or District Court."

In *Hawke vs. Service Products Corp., et al.*, 93 Fed. (2nd) 710, the Circuit Court of Appeals, Sixth Circuit, in 1938 held:

> "1. Appellate Courts do not presume error, but grant relief only where it is affirmatively made to appear that error has been committed."

Petition for certiorari in this cause was denied by this Court March 13, 1939.

In *Mercantile Trust Co. vs. Hensey*, 205 U. S. 298, this Court, opinion delivered by Mr. Justice Peckham, held:

> "It is for the plaintiff in error to show affirmatively that error was committed, it is not to be presumed and

will not be inferred from a doubtful statement in the record."

On question of Appeal and Error, 2nd *Cyc.*, page 703, it is stated:

"Objections to the report of a referee, auditor, or master, when made for the first time on appeal, will not be considered."

Citing supporting authorities from the Supreme Courts of many different States of the Union.

In the case of *Stephenson vs. State*, 119 Ohio State 349, the Supreme Court of Ohio, in 1928, held:

"3. Except where the jurisdiction of the trial court over the subject-matter of the action is involved, assignments of error in a petition in error filed in a reviewing court reach only alleged errors of law where objections were made and exceptions reserved in the trial court, and such reviewing court will only consider and determine alleged errors of law where the questions involved were raised and determined in the court of first instance."

ARGUMENT.

We submit that at times a referee, a special master, or a commissioner, may make a statement to the Court in his report or recommendation extraneous to the evidence. In such instances, the Court considers only the competent and relevant evidence and ignores the irrelevant and any such incompetent statement.

We submit also that at times when hearings are before the Court and when questions of the competency of certain offered evidence is presented, the Court will hear the offered evidence and later will disregard such proffered evidence and will consider only competent evidence, and reviewing courts do not find that error has intervened in such instances.

We submit, that it is the pronounced judgment of the District Court, Judge Jones, as evidenced by the Court's

Entry, *supra*, that is here for review, and not any statement made in the Commissioner's report to the Court, and we respectfully submit that the scope of review is limited by the nature and character of the decision of the Court below.

We further submit that the original Transcript Record of the evidence at pages 96 and 97, on file in this cause, shows that counsel for the farmer debtor first sought to elicit some appraisal opinion from the Commissioner over the objection of counsel for the secured creditor, the respondent herein.

Such record evidence is as follows:

Cross Examination by Mr. McClain of Mr. Cochran, a witness called on behalf of the secured creditor.

Mr. McClain, question to Mr. Cochran:

"Q. And what was this land appraised at before this one hearing to the Conciliator some three years ago?

Mr. Kimber: Well, I object. I don't know that Mr. Cochran would know.

Mr. McClain: I will ask the Conciliator to state what it was.

The Conciliator: Fifty-eight hundred dollars.

Q. Did you know what that was?

A. For tax purposes.

Q. You didn't know about the values in these proceedings?

A. You mean for taxation?

Q. Do you know about the values in these proceedings?

A. Well, I don't remember about the valuation of the proceedings here.

Q. That is all?

A. I know I appraised it for taxation."

Such inquiry, of course, was objectionable, as the Commissioner was not a witness.

However, the personal element of value by the Commissioner was thus erroneously injected into the record by the party now urging error to a[illegible]er statement, personal in character, made by such Commissioner to the Court.

It may well be inferred that such statement by the Commissioner was prompted by such inquiry, and we submit that under such circumstances the offending party cannot now seek to take any advantage of any such error.

AUTHORITIES CITED BY PETITIONER.

In the petitioner's brief for writ of certiorari, the case of *Moser, et al. vs. Mortgage Guarantee Co.*, 123 Fed. (2nd) 423, is cited and it is urged that it is authority for a reversal of the judgment of the Court in the instant case.

We submit that the *Moser* case is not in point and is clearly distinguishable from the facts in the instant case. In the opinion in the *Moser* case it is stated:

> "The Judge of the Bankruptcy Court, upon review of the proceedings, received the transcript of such hearing with the Commissioner's certificate, and without further evidence approved and confirmed the Commissioner's conclusion as to the value of the farm."

In the opinion of such case, it is further shown that an appraiser, who was appointed for that purpose, fixed and duly reported the value of the farm to be $9,000, and it is stated that the Commissioner, on his own volition, stated:

> "After hearing all parties in interest and their appraisers, and after making a personal visit to the ranch and looking the property over, and I talked to other property owners in the vicinity, I came to the conclusion that the property was worth Twelve Thousand Dollars ($12,000), and that is my finding, and I accordingly fixed the value at the said amount."

The Judge of the Bankruptcy Court, as shown by the opinion, merely adopted and affirmed such recommendation of the Commissioner, and the reviewing court held that

the appraisal value was that of the Commissioner, rather than that of the appraiser.

A very different state of facts is shown by the record in the instant case.

The other authorities cited are not in point.

CONCLUSION.

We respectfully submit that (1) since the judgment of the trial court is for review and not any statement made by the Commissioner, and (2) since no objection or exception to any statement made by the Commissioner was made or urged in the District Court, and (3) since reviewing courts do not consider errors not urged and considered in the trial court, and (4) since the record shows that the personal opinion of the Commissioner was first erroneously injected into these proceedings by the petitioner herein, and (5) since the record shows that the District Court's judgment was fair, just, and considerate, both to the farmer debtor and to the secured creditor, and that such judgment was in accord with the provisions provided in this portion of the bankruptcy law, this Court should affirm the judgments of the Courts below.

Respectfully submitted,

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George A. Kubler.